THE LAW OF AERIAL NAVIGATION.

BY LYTTLETON FOX.

THE many interesting problems of a legal or governmental nature, which may arise as a result of the achievement of practical flight, have already provoked some degree of speculative comment. The ways and means of policing the air, including the establishment of rules of the aerial road, the enforcement of speed limitations, the relative rights of heavier-than-air and lighter-than-air machines, regulations as to the character of ballast and the dropping thereof; the purely legal questions as to the international control and jurisdiction of the air, the rights of alien air-ships in time of peace and of neutrals in time of war, the dropping of explosives from air-ships (already the subject of a convention of The Hague Conference), all present problems which will tax alike the lawgivers and the executive. No question is so imminent in this country, however, and hence none so important as the construction which shall be put upon the law of trespass as applied to the air.

As soon as the navigation of the air becomes common, the question as to the legal right of the aeronaut to fly across the land of his neighbors will require immediate decision. Most American aeronauts have assumed that the upper air constitutes a sort of public highway through which any one is at liberty to pass, as is now the case in Germany and Switzerland, where the matter is regulated by special statute. A few aeronauts and some newspapers have undertaken to correct this impression by stating with positiveness the opposite view, that no person has a right to fly over any land but his own without committing a trespass. The reported cases bearing upon the subject are, to be sure, both meagre and somewhat ancient. It would be rash to predict to what extent our courts will feel

obliged to accept them as controlling, in view of the changed conditions which now obtain. But as the only existing authorities, they must be taken as constituting the law upon the subject at the present time; and an examination of them leads to the conclusion that the question is not so easily answered.

There are no American statutes upon the subject, and our own common law contributes nothing to it. We are at the outset referred, therefore, to the common law of England, and the Roman law. The possibility of invading the privacy of a man's land by passing through the air above it was considered by neither the Romans nor the English in laying down the law of trespass. The early lawmakers proceeded upon the assumption that man's movements were necessarily confined to the immediate vicinity of the earth's surface, and the law of trespass was framed in accordance with this view. The owner of the land held dominion of it from the centre of the earth up to the sky,—*cuius est solum eius usque ad coelum* was the ancient doctrine, beloved of the old judges, and the invader of this pyramidal empire of earth and air was a trespasser. If this rule is still law, there can be no doubt that crossing a man's land in an aeroplane, no matter at what height, is a trespass, and there is no question left for discussion. It is interesting to note, however, that nearly a hundred years ago some uneasiness was expressed by a Lord Ellenborough, Chief Justice, in regard to the wisdom of applying this rule literally in cases of aerial trespass, and more recent judicial utterances have tended to the same conclusion. Beyond question the old principle is firmly fixed as law both here and in England, so far as an invasion upon the surface or to a reasonable height above or below the surface is concerned. The exact problem as to which the decisions would tend to indicate that there is no such certainty, and the one which principally interests the aeronaut is this: Is it a trespass to sail across a man's land at a height greater than the reasonable scope of his effective possession; that is, at a height which cannot be held to interfere with his free use of his property? If it is not, the air is a highway for all practical purposes.

The earliest case in the books, that of Pickering *vs.* Rudd,* was decided in 1815. Rudd nailed a sign to a tree upon his land in such a way that the end of the sign projected slightly

* 4 Campbell, 219.

over the garden of his neighbor, Pickering. Pickering sued Rudd for trespass. Lord Ellenborough decided that it was no trespass. His decision, so far as it affects the right to maintain a fixed projection or encroachment over the land of one's neighbor has been repeatedly overruled both in England and this country. Indeed, the law is well established to the contrary. His Lordship's opinion is noteworthy, however, because it clearly anticipated the question which would arise in the case of an aeronaut. In it he instances a previous case in which a bullet was fired from outside a man's land, striking within it, and says that while he ruled that a trespass had been committed in that case, he would be doubtful in a case where the bullet should go clear across without striking. "I do not think," he says, "it is a trespass to interfere with the column of air superincumbent upon the close. . . . Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded." This is only a dictum, to be sure, but it is none the less a forcible expression of the view that the air, above the scope of effective possession, is not subject to the landowner's control. Nor is it weakened by the later rejection of the decision itself as affecting fixed projections.

The next contribution to the law came with the English case of Kenyon *vs.* Hart,* in which the defendant fired a bullet from outside of the complainant's boundary-line and killed a bird within, so that both bird and bullet came down on the complainant's land. Inasmuch as the defendant was tried under a statute against poaching, the wording of which was such as to cloud the main issue of trespass, the decision itself is of little value; but the Court indicates in its opinion (by Lord Blackburne) that if the huntsman had missed, and the bullet had sped across the complainant's land without striking, it would have been inclined to hold, with Lord Ellenborough, that no trespass had been committed.

In 1887 a decision was rendered by Lord Henry Hawkins in a case† which arose out of a complaint of trespass made by the

* 6 B. & S., 249. † 4 Times L. R., 8.

owner of lands near the Wimbledon rifle-ranges. It appears that the marksmen were accustomed to fire across the plaintiff's land at the targets beyond, so that the bullets passed over his land, without falling upon it, at a height of about 75 feet. The report says: "As regards the complaint that when the 1,000-yards range was used the bullets traversed the land of the plaintiff, his Lordship did not look upon the ground of complaint as constituting a trespass in the strict technical sense of the term, but he did look upon such firing of bullets as grievances which under the circumstances afforded the plaintiff a legal cause of action." Doubtless the Court referred the plaintiff to his remedy against the daily firing as a continuing nuisance. But the passage of bullets across the land at such a height as not to interfere with its occupancy was distinctly held to be not a trespass.

The projection of the cornice of a building, or the maintaining of a bridge or a telegraph wire over the land of another, and all similar fixed encroachments, have, as already noted, long been held to constitute acts of trespass both in this country and in England. The Courts are vigilant to-day in affording a remedy for such offences against the right of property, and the books are replete with decisions confirming the rule. Casual considerations would suggest that in principle there is nothing to distinguish such cases from those in which a projectile is fired across a man's land, or an aviator skims across it, excepting the duration of time consumed by the invasion, which in itself is not, as Lord Ellenborough suggests, sufficient basis for a sound legal distinction. There is, however, one other and very important difference. In the case of a fixed encroachment the courts have always in mind the danger that if the invasion is continued for more than twenty years it will grow into a right of property. An easement will arise giving the invader a perpetual right to maintain the encroachment, and thereby substantially reducing the estate of the property-owner. This could never be true in the case of any single and temporary invasion by an aeronaut. The effect of this distinction is that it places fixed encroachments, such as those mentioned, no matter at what height above the land they occur, in the class of invasions occurring within the reasonable scope of effective possession of the land, because they interfere with the owner's free use of

his property. If the commission of the trespass may operate in time to deprive the owner of the land of some incident of his ownership, there can be no question of its having interfered with his effective possession.

The writer ventures the conclusion that in all cases where the invasion does not occur within the reasonable scope of effective possession, the courts will incline to regard the foregoing cases as controlling and will hold that no trespass is committed. This does not mean that an aeronaut may pass within a few feet of the surface of another's land or buildings without the commission of a trespass, because any passage so close as to cause annoyance or apprehension would be an interference with such possession. But a passage at such a height as to preclude the idea of substantial injury would be lawful. The cases mentioned do not in this respect appear to have been overruled, but have, on the contrary, been cited with approval in later decisions. Sir Frederick Pollock, in his work on Torts, approves the rule laid down in them as the most reasonable one under all the circumstances. They present a view which would suit the conditions arising from universal navigation of the air without doing violence to the existing common law upon the subject of trespass generally. Moreover, if mankind has really conquered the air, the courts will hesitate to lend discouragement by making every passage over alien land a trespass, so long as the common law can be reasonably and consistently construed to the contrary.

But supposing the courts to hold the contrary, and to declare the aeronaut liable to an action for trespass at the suit of every person over whose land he passes, what will be the result?

It is not conceivable that the aggrieved person would be able to prove any substantial damage, even though his right of action be sound. This in itself would probably be a very substantial deterrent of litigation. There are circumstances under which the courts will enjoin further repetition of continuing trespasses, but it is very doubtful whether aerial trespasses of the character in question would be regarded as ground for injunction. It may well be, therefore, that the mere inability of the law to afford any substantial relief for these trespasses would render the trespassers practically free from legal interference, though in fact violators of the law. But that frequent and universal trespass on a large scale, theoretically banned by the law while

in effect protected by it, should be permitted to continue seems hardly probable. Where there is a right there is a remedy, particularly if any considerable number of persons are clamoring for the remedy. It is entirely reasonable to suppose that many persons in the community would insist upon preventing these trespasses if a means could be found. Heavy objects dropped from flying-machines will be a grave source of danger. Some people would insist upon their rights through apprehension of this and similar perils, and others in order to exact money for the privilege of passing over their land. If trespass is committed, it will not continue for lack of active and interested persons to invoke the aid of the courts against it.

Should the state, by the exercise of the right of domain, take the air above a certain fixed height and devote it to the purposes of a public highway, this would seem to be a partial solution of the problem of trespass. It would not be a complete solution because as matters stand at present the aeroplanist, in order to make a landing, must arise and descend on a slanting course, and should this continue to be necessary trespasses would be committed while passing between the earth level and the upper air. The project of condemning the air, while in a sense novel, would be perfectly feasible from a legal standpoint. There is apparently no question as to the power to establish such a highway. Moreover, it would possess the rare virtue of involving little or no expense. Granting that the air stratum condemned should be at such a height as not to interfere with the most ambitious building operations, six cents would seem to be full remuneration for the property taken from any individual owner for public purposes. The simple European expedient of declaring the air to be a highway, by statute, without exercise of eminent domain, would hardly seem practicable in this country, as constituting a taking of property without due compensation, unless the courts hold, as suggested, that the air is already a public highway above the height of effective possession.

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